Supreme Court, U.S.
FILED
991615 APR 06 2000

No. _____

In The

Supreme Court of the United States

GEORGE DAVID GREENE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR WRIT OF CERTIORARI

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67PP

QUESTION PRESENTED FOR REVIEW

Whether Petitioner, a convicted criminal defendant, is deprived of due process guaranteed by the Fourteenth Amendment when he is denied his statutory right to petition for appeal solely because complete trial transcripts were belatedly filed, even though (1) by rule and custom, the trial court clerk, not the Petitioner, has sole responsibility for the timely assembly of the record, including the transcripts; and (2) sufficient excerpts from the trial transcripts were timely filed to enable the court of appeals to render a decision on the merits without the complete transcripts.

LIST OF ALL PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, George David Greene, respectfully prays that a writ of certiorari issue to review the judgment and order below.

ORDERS BELOW

The order of the Supreme Court of Virginia, dated January 6, 2000, (App. A, 1a), is unpublished.

The order of the Court of Appeals of Virginia, dated June 4, 1999, (App. B, 2a-3a), is unpublished.

The order of the Court of Appeals of Virginia, dated December 30, 1998, (App. C, 4a-5a), is unpublished.

The order of the Circuit Court of Prince William County, Virginia, dated October 7, 1998, (App. D, 6a-8a), is unpublished.

JURISDICTION

The order of the Supreme Court of Virginia was entered January 6, 2000, (App. A, 1a), and the order of the Court of Appeals of Virginia was entered June 4, 1999, (App. B, 2a-3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The constitutional provision involved is U.S. Const. amend. XIV, which provides " . . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . . "

The statutory provision involved is Va. Code Ann. § 17.1-406A, which provides "Any aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of . . . a crime. . . . "

This case also involves Rules of the Supreme Court of Virginia, Rules 5A:7, 5A:8, and 5A:10. (App. E, 9a-14a.)

STATEMENT OF THE CASE

The appellate courts of Virginia denied Petitioner, George Greene, his right to petition for appeal from his wrongful conviction in state court. The denial of this right violates both the Due Process Clause of the Fourteenth Amendment as well as Virginia statutes.

Petitioner (Greene) was accused of squeezing another's buttocks in the locker room of a public pool. Greene was indicted for aggravated sexual battery and tried in Prince William County Circuit Court. The first trial ended in a hung jury; a second trial was held April 15, 1998 and resulted in a guilty verdict.

After trial Greene retained a new attorney and moved to set aside the verdict. Greene argued, inter alia, that (1) the trial court erroneously allowed the trial to

proceed without further inquiry despite Greene's assertion that the witnesses he had requested were not present; (2) the prosecutor improperly confronted Greene on cross-examination with misrepresentations of other testimony and used these misrepresentations to Greene's prejudice in closing argument; and (3) Greene's own attorney meanwhile made no objection or otherwise noted exceptions to this conduct. The trial court denied the motion August 7, 1998 and entered the sentencing order October 7, 1998. (App. D, 6a-8a.)

Greene filed a timely notice of appeal. However, the clerk of the Circuit Court of Prince William County transmitted the record to the Clerk of the Court of Appeals initially without including the trial or sentencing transcripts. (App. F, 15a-17a.) Generally, it is the practice of the clerk's office of the Circuit Court of Prince William County to order transcripts and incorporate them into the record before transmitting the record. (*Id.*) Indeed, prior to transmittal Greene's counsel repeatedly telephoned the clerk of the Circuit Court to ensure she was getting the record together for timely transmittal to the Court of Appeals. (*Id.*) However, in fact, through oversight, the Clerk did not order the transcripts until December 8, 1998, well after sixty days from entry of the Order appealed from October 7, 1998. (*Id.*) When the Clerk recognized her oversight she promptly ordered expedited copies of the transcripts which she ultimately transmitted to the Court of Appeals on January 13, 1999. (*Id.*)

On February 9, 1999 Greene timely filed his Opening Brief on the merits of his appeal. Included in the Brief were verbatim excerpts of all portions of the transcripts

necessary for the Court of Appeals to render a decision on the merits. (*See* App. G, 23a-25a, 29a-30a.)

On December 30, 1998, the Court of Appeals of Virginia noted that the record as initially transmitted to the Court of Appeals by the Circuit Court Clerk did not contain trial transcripts. (App. C, 4a-5a.) It ordered Greene to show cause why the appeal should not be dismissed because of this omission. (*Id.*) The Commonwealth of Virginia then moved to dismiss because there had not been a timely filing of the transcript in the trial court. Greene responded, noting that the responsibility for the tardy transcript filing was the Circuit Court Clerk's, not Greene's, but, in any event, Greene's Court of Appeals brief and other documents in the record contained verbatim excerpts of the trial transcript sufficient to allow the Court of Appeals to review the asserted errors and enter a decision on the merits. (*See* App. F, 15a-17a; App. H, 36a; App. I, 37a-38a.)

On June 4, 1999, without considering the Petition on the merits the Court of Appeals entered its order granting the Commonwealth's motion to dismiss Greene's petition for appeal solely because "the transcripts of the trial and the sentencing hearing were not timely filed" and that the "trial transcript is indispensable to a determination of the questions." (App. B, 2a-3a.)

Greene filed a timely notice of appeal from this order to the Virginia Supreme Court. In his Brief, Greene argued, inter alia, that the Court of Appeals erred by dismissing Greene's petition even though the responsibility for the belated transcript filing was Circuit Court clerk's, not Greene's, and that, in any event, there were

sufficient verbatim excerpts from the trial transcript properly before the Court of Appeals to enable it to review the claimed trial court errors. (App. J, 40a, 47a-49a.) Greene asserted that under the circumstances the Virginia Court of Appeals' failure to consider his petition for appeal on the merits violated, inter alia, his due-process rights under the Fourteenth Amendment. (App J, 49a.)

On January 6, 2000, the Virginia Supreme Court, "upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, . . . refuses the petition for appeal." (App. A, 1a.) The Court provided no further explanation for its Order.

REASONS FOR GRANTING THE WRIT

The argument in favor of granting this petition is simple but substantial: the Virginia Courts' decisions denying Greene his statutory right to petition for appeal directly conflicts with this Court's decision requiring that a state's appeal procedures, once adopted, comply with due process.

Although this Court has never held that a convicted criminal defendant has a due process or other constitutional right to an appeal, the Court has frequently recognized that once a state establishes avenues of appeal the Fourteenth Amendment requires that "those avenues . . . be kept free of unreasoned distinctions that can only impede open and equal access to the Courts." *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969) (quoting

Rinaldi v. Yeager, 384 U.S. 305, 310-11 (1966)). In other words, although there is no "right" to an appeal in the same sense as there is a "right" to a trial, nonetheless, once the state establishes an appeal process, "the constitutional right under the Due Process Clause is simply the right not to be denied an appeal for arbitrary or capricious reasons." *Griffin v. Illinois*, 351 U.S. 12, 37 (1956) (Harlan, J., dissenting); *see Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985).

Here the Commonwealth of Virginia violated the clear mandate of the Due Process Clause as enunciated by this Court. By statute, Virginia does provide an avenue of appeal for convicted criminal defendants: "Any aggrieved party may present a petition for appeal to the Court of Appeals from (1) any final conviction in a Circuit Court of a . . . crime. . . . " Va. Code Ann. § 17.1-406A.

In the instant case the Circuit Court expressly informed Greene of this right. (*See* App. D, 6a.) Yet both the Virginia Court of Appeals and the Virginia Supreme Court refused even to consider Greene's Petition for Appeal, and instead summarily dismissed his petition. (*See* App. A, 1a; App. B, 2a-3a.)

The only specific reason given by either court for dismissing Greene's petition is that the "transcripts of the trial and the sentencing hearing were not timely filed." (App. B, 2a.) For two separate reasons, however, under the circumstances of this case, this basis for dismissing Greene's petition without even considering the merits is arbitrary and capricious, constituting an "unreasoned distinction" in violation of the Fourteenth Amendment, as discussed below.

First, no Virginia statute or court rule places the responsibility for filing the trial or sentencing hearing transcripts on the appealing party. The Virginia Court of Appeals cited only Rule 5A:8(a) in support of its conclusion that the transcripts were not timely filed (App. B, 2a), but that provision simply does not impose the filing responsibility on an appellant (App. E, 10a).

Instead, Rule 5A:10(a) and (b) regarding preparation of the record for transmittal to the Court of Appeals place responsibility for preparing the record, expressly including the transcripts, on the clerk of the trial court. (App. E, 13a-14a.) The conclusion that this is the clerk's responsibility rather than the appealing party's is buttressed by Rule 5A:10(d) which states that "the failure of the trial court to transmit the record as herein provided shall not be a ground for dismissal of the appeal by the Court of Appeals." (*Id.*) Moreover, the long-standing practice in the trial court for the Clerk of Court to order the transcript and include it in the record in a timely manner further supports the position that it is the Clerk, not the Appellant, who bears responsibility for timely inclusion of the transcript in the record. (*See* App. F, 15a-16a.)

Courts in several jurisdictions follow similar procedures and, where the Clerk has the responsibility for filing the transcript the Courts in such jurisdictions do not consider it fair or reasonable to deny an appellant access to the appellate courts because of a clerk's tardiness. *See Liljehorn v. Fyfe*, 178 Neb. 532, 134 N.W.2d 230, 232 (1965) (party cannot be deprived of right to appeal by nonfeasance of court officer to prepare record properly); *Cobb v. Cobb*, 62 Ohio St. 2d 124, 403 N.E.2d 991, 992 (1980) (the law will not permit a party to suffer detriment

by reason of the neglect or misconduct of an officer charged with a public duty).

In sum, when, as here, it is the clerk, not the Appellant, who bears the responsibility for filing the transcripts, it is arbitrary and capricious in the extreme to deny the appealing party his statutory right to petition for appeal solely because the clerk fails to perform his or her duty on time. Conditioning the statutory right to petition for appeal on a factor entirely outside the appealing party's control is an "unreasoned distinction," violative of the Fourteenth Amendment.

A second, independent reason also demonstrates that this denial of the statutory right to petition for appeal violates due process under the circumstances here. Under Virginia law pertaining to the appeals process, if the record on appeal is sufficient in the absence of the transcript to determine the merits of the Appellant's allegations, the Court of Appeals may still hear the case despite that absence. *Turner v. Commonwealth*, 2 Va. App. 96, 341 S.E.2d 400, 401 (1986). In his briefs to both the Virginia Court of Appeals and Supreme Court, each of which was timely filed, Greene provided verbatim excerpts of those parts of the transcripts relevant to each of his claims on appeal. (*See* App. G, 23a-25a, 29a-30a; App. J, 45a-47a, 54a.) In short, the transcripts themselves were unnecessary to a determination on the merits because all relevant excerpts had been timely filed. Blind insistence on timely filing of the transcripts when, as here, full transcripts were unnecessary to any determination on the merits, is arbitrary, capricious, and an unreasoned distinction that deprives Greene of his Fourteenth Amendment right to due process.

In sum, when the right to petition for an appeal has been provided by state statute, it "should not be withdrawn without consideration of applicable due process norms." *See Evitts*, 469 U.S. at 389. "[W]hen a state opts to act in a field where its action has significant discretionary elements it must nonetheless act in accord with the dictates of the Constitution – and in particular, in accord with the Due Process Clause." *Id.* Here, the Virginia Court's decision to deny Greene his statutory right to petition for appeal for no rational reason directly conflicts with these principles. Review should be granted to resolve this conflict and reassert the primacy of due process in Virginia's appellate process.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

FRANCIS CHESTER
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Churchville, Virginia, 24421
(540) 337-7270
Attorney for Petitioner

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APPENDIX A

VIRGINIA:

In the Court of Appeals of Virginia on Friday *the* 4th *day of* June, 1999.

George David Greene, Appellant,

against Record No. 2399-98-4
Circuit Court No. CR 41868

Commonwealth of Virginia, Appellee.

From the Circuit Court of Prince William County

The transcripts of the trial and the sentencing hearing were not timely filed. *See* Rule 5A:8(a).

In his petition for appeal, appellant raises the following questions:

1. Was it error for the court to allow the trial to proceed without further inquiry despite defendant's claim that the witnesses he had requested were not present?

2. Was error present where (1) [the] Commonwealth's Attorney repeatedly misstated defendant's testimony, vouched for the accuracy of those misstatements, cross-examined the defendant with those bolstered misstatements and focused on them in his closing argument as evincing both defendant's motive and lack of credibility; and (2) he falsely attributed testimony to a prosecution witness during cross-examination of defendant?

The trial transcript is indispensable to a determination of these questions. Accordingly, appellee's motion to dismiss is granted and the petition for appeal hereby is

dismissed. *See Turner v. Commonwealth*, 2 Va. App. 96, 99-100, 341 S.E.2d 400, 402 (1986).

This order shall be certified to the trial court.

A Copy,

Teste:

/s/ Cynthia L. McCoy
Clerk

APPENDIX B

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday *the* 30th *day of* December, 1998.

George David Greene, Appellant,

against Record No. 2399-98-4
Circuit Court No. CR 41868

Commonwealth of Virginia, Appellee.

From the Circuit Court of Prince William County

On preliminary examination, the Court concludes that neither a transcript nor statement of facts was timely filed in this case, *see* Rule 5A:8, and that no extension of time in which to file a transcript or statement of facts is now possible, *Jordan v. Price*, 3 Va. App. 672, 353 S.E.2d 168 (1987). While the absence of the transcript or statement of facts does not always deprive this Court of jurisdiction, the Court will consider only those issues which may be decided without reference to a transcript or statement of facts. "When a transcript is indispensable to the determination of an issue, the absence thereof in the record is a jurisdictional defect and requires dismissal of the claim." *Goodpasture v. Goodpasture*, 7 Va. App. 55, 57, 371 S.E.2d 845, 846 (1988) (family law case saved from dismissal by judge's letter opinion, other documents). *E.g., Anderson v. Commonwealth*, 13 Va. App. 506, 413 S.E.2d 75 (1992) (statement of facts in criminal case); *Turner v. Commonwealth*, 2 Va. App. 96, 341 S.E.2d 400 (1986) (transcript in criminal case); *Barrett v. Barrett*, 1 Va. App. 378, 380, 339 S.E.2d 208, 210 (1986) (neither filed).

Accordingly, it is ordered that appellant shall show cause, by a reply to this order on or before January 14, 1999, why this appeal should not be dismissed. In any response to this order, appellant shall state clearly any questions properly presented by this appeal, *see* Rules 5A:12(c) and 5A:20(c), and preserved for appellate review, *see* Rule 5A:18, which can be considered without resort to the transcript or statement of facts. Appellant shall further explain why the questions can be decided without reference to the transcript or statement of facts. The period for filing pleadings shall not be enlarged by this order.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ Illegible
Deputy Clerk

APPENDIX C

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

FEDERAL INFORMATION PROCESSING STANDARDS CODE: 153

Hearing Date: August 21, 1998
Judge: FRANK A. HOSS, JR.

COMMONWEALTH OF VIRGINIA

v.

GEORGE DAVID GREENE,
Defendant

This case came before the Court for sentencing of the defendant, who appeared in person with counsel, George Chester. The Attorney for the Commonwealth was present.

On April 15, 1998, the defendant was found guilty of the following:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR 41868	AGGRAVATED SEXUAL BATTERY (F)	11/11/96	18.2-67.3

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code 19.2-299.

Pursuant to the provisions of Code 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the Virginia Department of Corrections for the term of one year and to pay a fine in the amount of $10,000.00.

This sentence shall run consecutively to all other sentences.

The Court **SUSPENDS one year** of the sentence upon the following conditions:

Good behavior. The defendant shall keep the peace and be of good behavior.

Supervised probation. The defendant is placed on *intensive* probation to commence today or upon release from incarceration, under the supervision of a Probation Officer for a period of four years, or unless sooner released by the Court. The defendant shall comply with all the rules and requirements set by the Probation Officer and as shown on Form PPS 2 of the Virginia Department of Corrections, which are included herein by reference thereto.

Other Special Program. The defendant is to avoid any contact with young people and receive sex offender treatment, both under the supervision of a probation officer.

Court Costs. It is further ORDERED as a special condition of the defendant's supervised probation that the defendant pay court costs at the rate of $800.00 per month, which fines and/or court costs are to be fully paid during the probationary period.

The Court Orders the Clerk of this Court to docket a judgment against the defendant for the court costs.

DNA Analysis. As a condition of the suspended sentence, the Court Orders the defendant to forthwith report to the Prince William-Manassas Regional Adult Detention Center for the purpose of taking a blood sample for DNA analysis pursuant to Section 19.2-310.2 et seq.

Sex Offender Registration. Within 10 days from the date of sentencing, or within 10 days of the defendant's release from any incarceration imposed, the defendant shall register with the Department of State Police and shall keep that registration current all as provided in Section 19.2-298.1 of The Code of Virginia. Compliance with this provision constitutes a special condition of any probation or suspended sentence.

Sex Offender Polygraph Tests. As a condition of probation, the defendant may be required to submit to polygraph tests as part of the sexual offender treatment program, at the discretion of the Probation Officer.

Right of Appeal. The Court proceeded to advise the defendant of defendant's right to appeal, including the right to note defendant's appeal to the appropriate appellate court, with due and timely written notice to the Clerk of this Court, and the right to have an attorney to represent the defendant or to have an attorney appointed to represent the defendant and to have the attorney's fees, costs and expenses in connection with any appeal paid for in the event the defendant is financially unable to pay the same.

Attorney Certification. The Court certifies that at all times during the trial of this case the defendant was personally present as was defense counsel who capably represented the defendant for which services counsel is awarded a fee of $ _____.

ENTERED: 10-7-98

/s/ Frank A. Hoss, Jr.
FRANK A. HOSS, JR., JUDGE

DEFENDANT IDENTIFICATION:

SSN: 226-56-3069 DOB: 11/23/41 Sex: male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: one year; $10,000.00 fine

TOTAL SENTENCE SUSPENDED: one year

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 6th *day of* January, 2000.

George David Greene, Appellant,

against Record No. 991533
Court of Appeals No. 2399-98-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk
By: /s/ Jennifer G. Ealer
Deputy Clerk

APPENDIX E

Va. Court of Appeals

Rule 5A:7. Record on Appeal: Contents.

(a) *Contents.* – The following constitute the record on appeal from the trial court:

(1) the original papers and exhibits filed or lodged in the office of the clerk of the trial court, including any report of a commissioner in chancery and the accompanying depositions and other papers;

(2) each instruction marked "given" or "refused" and initialed by the judge;

(3) each exhibit offered in evidence, whether admitted or not, and initialed by the trial judge (or any photograph thereof as authorized by § 19.2-270.4 (A) and (C)). (All non-documentary exhibits shall be tagged or labeled in the trial court and the tag or label initialed by the judge.);

(4) the original draft or a copy of each order entered by the trial court;

(5) any opinion or memorandum decision rendered by the judge of the trial court;

(6) any deposition and any discovery material encompassed within Part Four offered in evidence (whether admitted or rejected) at any proceeding; and

(7) the transcript of any proceeding or a written statement of facts, testimony, and other incidents of the case when made a part of the record as provided in Rule

5A:8, or the official videotape recording of any proceeding in those circuit courts authorized by the Supreme Court to use videotape recordings. The Court of Appeals may require that any videotape proceedings. The Court of Appeals may require that any videotape proceedings be transcribed, in whole or in part, and made a part of the record as provided in Rule 5A:8, except that the transcript shall be filed within 60 days after the entry of the order requiring such transcript; and

(8) the notice of appeal.

(b) *Disagreement on Contents.* – If disagreement arises as to the contents of any part of the record, the matter shall be submitted to and decided by the trial court.

* * *

Rule 5A:8. Record on Appeal: Transcript or Written Statement.

(a) *Transcript.* – The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of the final judgment. Upon a written motion filed within 60 days after entry of the final judgment, a judge of the Court of Appeals may extend this time for good cause shown. The mailing provisions of Rule 5A:3(c) shall not apply to motions made pursuant to this paragraph.

(b) *Notice.* – Within ten days after the transcript is filed or, if the transcript is filed prior to the filing of the

notice of appeal, within ten days after the notice of appeal is filed, counsel for appellant shall (1) give written notice to all other counsel of the date on which the transcript was filed, and (2) file a copy of the notice with the clerk of the trial court. There shall be appended to the notice either a certificate of counsel for appellant that a copy of the notice has been mailed to all other counsel or an acceptance of service of such notice by all other counsel.

When multiple transcripts are filed, the ten-day period for filing the notice required by this Rule shall be calculated from the date on which the last transcript is filed or from the date on which the notice of appeal is filed, whichever is later. The notice of filing transcripts shall identify all transcripts filed and the date upon which the last transcript was filed.

If the notice of appeal states that no additional transcripts will be filed and identifies the transcripts that have been filed, if any, then no additional written notice of filing transcripts is required and the notice of appeal will serve as the notice of filing transcripts for purposes of Rule 5A:8(b).

Any failure to file the notice required by this Rule that materially prejudices an appellee will result in the affected transcripts being stricken from the record on appeal. For purposes of this Rule, material prejudice includes preventing the appellee from raising legitimate objections to the contents of the transcript or misleading the appellee about the contents of the record. The appellee shall have the burden of establishing such prejudice in the brief in opposition or, if no brief in opposition is filed,

in a written statement filed with the clerk of the Court of Appeals within twenty-one days after the record is received by the clerk.

When the appellant fails to ensure that the record contains transcripts or a written statement of facts necessary to permit resolution of appellate issues, any assignments of error affected by such omission shall not be considered.

(c) *Written Statement.* – In lieu of a transcript, a written statement of facts, testimony, and other incidents of the case, which may include or consist of a portion of the transcript, becomes a part of the record when:

(1) within 55 days after entry of judgment a copy of such statement is filed in the office of the clerk of the trial court. A copy must be mailed or delivered to opposing counsel accompanied by notice that such statement will be presented to the trial judge no earlier than 15 days nor later than 20 days after such filing; and

(2) the statement is signed by the trial judge and filed in the office of the clerk of the trial court. The judge may sign the statement forthwith upon its presentation to him if it is signed by counsel for all parties, but if objection is made to the accuracy or completeness of the statement, it shall be signed in accordance with subsection (d) of this Rule.

(d) *Objections.* – Any party may object to a transcript or written statement on the ground that it is erroneous or incomplete. Notice of such objection specifying the errors alleged or deficiencies asserted shall be filed with the clerk of the trial court within 15 days after the

date the notice of filing the transcript (subsection (b) of this Rule) or within 15 days after the date the notice of filing the written statement (subsection (c) of this Rule) is filed in the office of the clerk of the trial court or, if the transcript or written statement is filed before the notice of appeal is filed, within 10 days after the notice of appeal has been filed with the clerk of the trial court. The clerk shall give prompt notice of the filing of such objections to the trial judge. Within ten days after the notice of objection is filed with the clerk of the trial court, the judge shall:

(1) overrule the objection; or

(2) make any corrections that he deems necessary; or

(3) include any accurate additions to make the record complete; or

(4) certify the manner in which the record is incomplete; and

(5) sign the transcript or written statement.

At any time while the record remains in the office of the clerk of the trial court, the trial judge may, after notice to counsel and hearing, correct the transcript or written statement.

The judge's signature on a transcript or written statement, without more, shall constitute his certification that the procedural requirements of this Rule 5A:8 have been satisfied.

* * *

Rule 5A:10. Record on Appeal: Preparation and Transmission.

(a) *Preparation.* – The clerk of the trial court shall prepare the record as soon as possible after notice of appeal is filed. In the event of multiple appeals in the same case, or in cases tried together, only one record need be prepared and transmitted.

(b) *Form of the Record.* – (1) The record shall be compiled in the following order:

(a) a front cover setting forth the name of the court and the short style of the case;

(b) a table of contents listing each paper included in the record and the page on which it begins;

(c) each paper constituting a part of the record in chronological order; and

(d) the certificate of the clerk of the trial court that the foregoing constitutes the true and complete record, except omitted exhibits as hereinafter provided.

(2) Each page of the record shall be numbered at the bottom.

(3) Transcripts, depositions, and reports of commissioners may be included in separate volumes identified by the clerk of the trial court if referred to in the table of contents and at the appropriate place in the record.

(4) Exhibits, other than those filed with pleadings, may be included in a separate volume or envelope certified by the clerk of the trial court, except that any exhibit that cannot be conveniently placed in a volume or envelope shall be identified by a tag. Each such volume or

envelope shall include, on its cover or inside, a descriptive list of exhibits contained therein. Reference shall be made to exhibits in the table of contents and at the appropriate place in the record referred to in paragraph (1). Exhibits of unusual character, bulk, or weight may, at the option of the clerk of the trial court, and after written notice to all counsel, not be transmitted unless he is directed to do so by counsel or by the clerk of the Court of Appeals. Counsel must make advance arrangements for the transportation and receipt of exhibits of unusual character, bulk, or weight.

(5) Any transcript or statement that the clerk of the trial court deems not a part of the record because of untimely filing shall be certified by him as such and transmitted with the record.

(c) *Abbreviated Record.* – When the questions presented by an appeal can be determined without examination of all the pleadings, facts, testimony, and other incidents of the case, all counsel with the approval of the trial court may prepare for submission an abbreviated record, stating how the questions in the case arose and were decided, and setting forth only so much of the pleadings, facts, testimony, and other incidents of the case as are essential to a determination of the issues on appeal. Such abbreviated record shall be signed by all counsel and the trial judge and filed in the office of the clerk of the trial court. It will be assumed that the abbreviated record contains everything germane to the questions presented. The Court of Appeals may, however, consider other parts of the record to enable the Court to attain the ends of justice.

(d) *Transmission.* – The clerk of the trial court shall retain the record for 21 days after the notice of appeal has been filed with him pursuant to Rule 5A:6. If the notice of appeal states that a transcript or statement will thereafter be filed, the clerk of the trial court shall retain the record for 21 days after the filing in his office of such transcript or statement or, if objection is made to the transcript or statement pursuant to Rule 5A:8 (d), the clerk of the trial court shall retain the record for five days after the objection is acted upon by the trial judge. The clerk of the trial court shall then forthwith transmit the record to the clerk of the Court of Appeals; provided, however, that, notwithstanding that the foregoing periods of retention may not have expired, the clerk of the trial court shall transmit the record sooner if requested in writing by counsel for all parties to the appeal and shall, whether or not so requested, transmit the record in time for delivery to the clerk of the Court of Appeals within three months after entry of the judgment appealed from. The failure of the clerk of the trial court to transmit the record as herein provided shall not be a ground for dismissal of the appeal by the Court of Appeals.

(e) *Notice of Filing.* – The clerk of the Court of Appeals shall promptly notify all counsel of the date on which the record is filed in the office of the clerk of the Court of Appeals.

(f) *Disposition of Record.* – When the mandate is issued by the Court of Appeals, the clerk of the Court of Appeals shall return the record to the clerk of the trial court or commission in which the proceeding originated. The record shall be returned by that clerk upon the request of the clerk of the Court of Appeals.

APPENDIX F

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA

George David Greene, Appellant, v. Commonwealth of Virginia, Appellee.	Record # 2399-98-4 APPELLANT'S SUPPLEMENTAL RESPONSE TO THE COURT OF APPEALS' SHOW CAUSE ORDER.

Regarding the show cause order dated 30 December 1998 and your letter of 19 January 1999:

It is the long-standing practice of the Circuit Court in Prince William County to order the trial transcript of each case for incorporation into the record. In fact, this is the practice with all the circuit courts of this state with which the appellant's attorney is familiar. After filing our notice of appeal in October of 1998, we repeatedly contacted the clerk's office to insure that all portions of the record – including the transcript – were in place and would be filed timely and, moreover, that there was nothing else we should do to support the clerk in the compilation of the record. We were assured that all matters had been taken care of in the usual fashion and that we should await notice of the record's transmittal. However, we would later discover, the clerk's office had in fact not obtained a transcript or ever requested one.

When the court recognized their oversight they notified us and promptly ordered an expedited copy of the trial transcript on 28 December 1998. We were informed

that, despite what we had been told previously, the office had failed to obtain a transcript. "It was an oversight on our part," we were told by the Deputy Clerk Tamara Free. On 13 January 1999, the transcript was transmitted to the Court of Appeals.

We are assured that the Commonwealth would not be prejudiced by the delayed transcript since the Defendant's 24 July 1998 brief in support of a motion to set aside the verdict (which, on its own, could stand as a 5A:8 (c) statement of facts or otherwise support all the issues presented on appeal) contains all the relevant facts and quotes to be referenced in our appeal.

In this instance, we reasonably relied on the circuit court clerk's office and on the repeated attestations thereof. We are told that this mistake is unprecedented in that office and we hope that it will not jeopardize our appeal.

Please contact us if you have any question whatsoever. You might also wish to contact Tamura L. Free, Deputy Clerk of the Prince William County Circuit Court at (703) 792-6292. See attached affidavit for further documentation.

/s/ Francis Chester
Francis Chester, Esq.
3581 Churchville Ave.
Churchville, VA 24421
Attorney for Appellant
Tel. (540) 337-7270
Fax (540) 337-7278

Dated: 25 January 1999

CERTIFICATE OF MAILING

I do hereby certify that a copy of the foregoing **Appellant's Supplemental Response to the Court of Appeals' Show Cause Order** was mailed by First Class Mail to Prince William Circuit Court Clerk, Tamara L. Free at 9311 Lee Avenue, Manassas, Virginia 20110-5598 and to Paul B. Ebert, Commonwealth's Attorney for Prince William County at 9311 Lee Avenue, Manassas, Virginia 20110, this 25th day of January, 1999.

/s/ Francis Chester
Francis Chester

APPENDIX G

IN THE
COURT OF APPEALS OF VIRGINIA
AT RICHMOND

Record No. 2399-98-4

GEORGE DAVID GREENE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA

Appellee.

OPENING BRIEF OF APPELLANT

[Certified Mail Receipt Omitted In Printing]

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Statement of the Case

The Appellant, George Greene, was indicted for aggravated sexual battery pursuant to Virginia Code § 18.2-67.3. It was alleged by the prosecution that he squeezed the buttock of a boy, Travis Cook, in the presence of Seth Hurley, Cook's friend, while all three were in the locker room of a public pool. The first trial of 10 Dec. 1997 ended in a hung jury. A second trial was held in the Prince William County Circuit Court on 15 April 1998. When queried by the judge at the outset, Mr. Greene indicated that the witnesses he had requested were not present, whereupon his attorney said they had no witnesses. The trial proceeded with Mr. Greene the sole defense witness. During cross-examination Mr. Greene was confronted with misquotes of his own testimony and with misrepresentations of another witness's testimony. The prosecutor referred to these misquotes in his closing arguments. There we no related exceptions noted to any of these matters.

The jury returned a verdict of guilty and the Defendant retained a new attorney. The Defendant's motion to set aside the verdict on the grounds of prosecutorial misconduct and ineffective assistance of counsel was denied by an order dated 7 August 1998, and the sentencing order was entered on 7 October 1998.

Questions Presented

I. **Was it error for the court to allow the trial to proceed without further inquiry despite Defendant's claim that the witnesses he had requested were not present?**

Appellant answers "Yes."

II. **Was error present where, (1) Commonwealth's Attorney repeatedly misstated Defendant's testimony, vouched for the accuracy of those misstatements, cross-examined the defendant with these bolstered misstatements and focused on them in his closing argument as evincing both Defendant's motive and lack of credibility; and (2) he falsely attributed testimony to prosecution witness during cross-examination of Defendant?**

Appellant answers "Yes."

* * *

APPENDIX H

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA

George David Greene, Appellant, v. Commonwealth of Virginia, Appellee.	Record #2399-98-4

Regarding the show cause order dated 30 December 1998:

We have contacted the Prince William County Circuit Court and they said that they neglected to include the transcript that we requested in the transmission of the record to your court, but that they will rectify the situation by transmitting it as soon as possible. If there is any more that needs to be done to respond to this order or if the transmittal of this portion of the record is delayed any further, please contact us.

/s/ Francis Chester

Francis Chester, Esq.
3581 Churchville Ave.
Churchville, VA 24421
Attorney for Appellant
Tel. (540) 337-7270
Fax (540) 337-7278

Dated: 7 January 1999

APPENDIX I

VIRGINIA:
IN THE COURT OF APPEALS OF VIRGINIA

GEORGE DAVID GREENE,
Petitioner,

v. **Record No.: 2399-98-4**

COMMONWEALTH OF VIRGINIA
Respondent.

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS PETITION FOR APPEAL

COMES NOW the Petitioner in response to the Commonwealth's Motion to Dismiss Petitioner's Petition for Appeal and responds as follows:

1) The transcript of both the trial and sentencing hearing were filed pursuant to a delayed request by the deputy clerk of the Circuit Court of Prince William County, following repeated calls by this office to have the transcripts timely filed.

2) The short delay by the Clerk in filing the requested transcripts with the Clerk of the Court of Appeals in no way caused the Commonwealth undue hardship.

3) The brief and other documents on file with the Clerk of this Court are ample documents to establish the necessaries and will suffice even in lieu of a formalized statement of facts or transcripts.

4) Petitioner is willing to accede to Respondent's request for further time to reply to Petitioner's brief.

5) Petitioner requests time for oral argument if this Court denies Respondent's Motion and allows the appeal to go forward.

GEORGE DAVID GREENE
By Counsel

/s/ Francis Chester
Francis Chester, J.D.
3581 Churchville Avenue
Churchville, Virginia 24421
540-337-7270
VSB #07804
Counsel for Petitioner

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Petitioner's Response to Respondent's Motion to Dismiss Petition for Appeal was mailed by First Class Mail to Toinette L. Reynolds, Assistant Commonwealth's Attorney at 9311 Lee Avenue, Manassas, Virginia 20110, this 12th day of March, 1999.

/s/ Francis Chester
Francis Chester

APPENDIX J

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. _____

GEORGE DAVID GREENE,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

PETITION FOR APPEAL BY APPELLANT

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STATEMENT OF THE CASE

The Appellant, George David Greene, was indicted for aggravated sexual battery pursuant to Virginia Code 18.2-67.3. It was alleged by the prosecution that he squeezed the buttock of a boy, Travis Cook, in the presence of Seth Hurley, Cook's friend, while all three were in the locker room of a public pool. The first trial of 10 Dec. 1997 ended in a hung jury. A second trial was held in the Prince William County Circuit Court on 15 April 1998. When queried by the judge at the outset, Mr. Greene indicated that the witnesses he had requested were not present, whereupon his attorney said they had no witnesses. The trial proceeded with Mr. Greene the sole defense witness. During cross-examination Mr. Greene was confronted with misquotes of his own testimony and with misrepresentations of another witness's testimony. The prosecutor referred to these misquotes in his closing arguments. There were no related exceptions noted to any of these matters.

The jury returned a verdict of guilty and the Defendant retained a new attorney. The Defendant's motion to set aside the verdict on the grounds of prosecutorial misconduct and ineffective assistance of counsel was denied by an order dated 7 August 1998, and the sentencing order was entered on 7 October 1998.

Appellant's counsel repeatedly telephoned the Clerk of the Circuit Court of Prince William County concerning getting the record together for appeal to the Court of Appeals. For some undisclosed reason the clerk of the Circuit Court of Prince William County filed the record

with the Clerk of the Court of Appeals apparently without the transcripts. The Clerk did not order the transcripts from the transcriber until Dec. 28, 1998 which is well over the sixty (60) days from the date of the entry of the order (October 7, 1998). It is the long-standing practice of the Circuit Court in Prince William County to order the trial transcripts of each case for incorporation into the record. When the Clerk of the circuit Court of Prince William County recognized her oversight she promptly ordered an "expedited" copy of the trial transcripts on December 28, 1998. We were informed that the Clerk's Office of the Circuit Court had failed to obtain a transcript. "It was an oversight on our part," we were told by the Deputy Clerk, Tamara L. Free. On January 13, 1999, the transcripts were transmitted to the Court of Appeals. *See Exhibit A-Affidavit of Transcriber.*

Objection was filed by the Prosecution Office to the late filing and the Court of Appeals dismissed the appeal without ever addressing the merits of the case.

QUESTIONS PRESENTED

I. Was it error for the Court of Appeals to dismiss the Defendant's (Appellant) appeal on the grounds that the transcripts filed from the trial court clerk of Prince William County were belatedly filed, even though the fault was on the part of the Clerk of the Circuit Court who had complete control over assembling the file including securing the transcripts?

Appellant answers "Yes."

II. Was it error for the Court of Appeals not to accept belated filed transcripts in that there were sufficient quotes from the relevant parts of the transcript to enable the Court to rule on the merits of the case instead of dismissing the case on technical grounds?

Appellant answers "Yes."

III. Was it error for the court to allow the trial to proceed without further inquiry despite Defendant's claim that the witnesses he had requested were not present?

Appellant answers "Yes."

IV. Was error present where, (1) Commonwealth's Attorney repeatedly misstated Defendant's testimony, vouched for the accuracy of those misstatements, cross-examined the Defendant with these bolstered misstatements and focused on them in his closing argument as evincing both Defendant's motive and lack of credibility; and (2) he falsely attributed testimony to a prosecution witness during cross-examination of Defendant?

Appellant answers "Yes."

STATEMENT OF FACTS:

George David Greene was accused of aggravated sexual battery pursuant to Virginia Code 18.2-67.3. It was alleged by the prosecution that he squeezed the buttock of a boy, Travis Cook, in the presence of Seth Hurley, Cook's friend, while all three were in the locker room of a public pool. Both boys testified at his first trial of 10 Dec. 1997. This trial ended with a hung jury.

Mr. Greene's second trial was held in the Prince William County Circuit Court on April 15, 1998. The prosecution's two eyewitnesses were Hurley and Cook. Mr. Greene was the only witness called by the defense. When asked by the Court whether he had given his counsel a list of all witnesses he thought should be present for this trial, Mr. Greene answered. "Yes, sir." (Trial trans. 4:17-20) When asked by the Court whether those witnesses were present defendant answered "No." (Trial trans. 4:21-22) The Defense Counsel then stated that they had no witnesses and he answered "yes" when asked whether he was prepared for trial that day. (Trial trans. 5:1-2)

When testifying on cross-examination Seth Hurley made the following account:

> Q HE NEVER MENTIONED THAT SOME MAN WAS TALKING TO HIM ABOUT A SWIM MEET AND THINGS LIKE THAT?
>
> A YEAH; I REMEMBER HIM TALKING TO ME ABOUT – LIKE A GUY COMING UP TO HIM AND TALKING ABOUT HOW HE SWIMS, WHEN IS HIS SWIM MEETS AND STUFF LIKE THAT.
>
> Q DID HE EVER MENTION WHO IT MIGHT HAVE BEEN?
>
> A NO; HE DIDN'T KNOW HIM. THAT'S WHAT HE SAID.

(Trial trans. 103:16-22)

During direct examination, Mr. Greene was asked about a specific instance in which he had encountered his accuser, Mr. Cook. He described the occasion, how he had mentioned to the boy that the water was cold, and that, in response to his comment "all [the boy] did was stop and

throw his stuff into a locker." (Trial trans., 152:7.) This was in the context of describing the demeanor of the boy during a single encounter where Mr. Greene spoke to Mr. Cook. (Trial trans. 152:1-13)

During cross-examination, the prosecutor asked Mr. Greene about his testimony as to the hours Travis swam. Then he put the following question:

> Q AND YOU ARE AWARE OF WHAT HE DOES WHEN HE USUALLY GETS INTO THE LOCKER ROOM. I WROTE IT DOWN. YOU SAID, "USUALLY HE WOULD JUST GET HIS STUFF AND THROW IT IN THE LOCKER AND LEAVE;" RIGHT?
>
> A YES.
>
> Q SO YOU HAVE SPENT SOME TIME WATCHING TRAVIS, HAVEN'T YOU?
>
> A I HAVEN'T –
>
> Q MR. GREENE?
>
> (Trial trans. 157:15-23)

Mr. Greene stumbled through the next page and half of testimony about whether he "spent a lot of time watching Travis" as indicated by the statement the prosecutor quoted. (Trial trans. 158:7) The quote puts Mr. Greene in the position of defending a statement that he had not made. Against the prosecutor uses the same quote:

> Q YOU TESTIFIED ON DIRECT EXAMINATION, "USUALLY HE WOULD JUST GET HIS THINGS AND THROW THEM IN THE LOCKER." HOW DO YOU KNOW THAT IS WHAT HE USUALLY DID? BECAUSE YOU WERE PAYING ATTENTION TO HIM; ISN'T THAT TRUE?
>
> A I ONLY SAW HIM THREE OR FOUR TIMES. AND HE TESTIFIED TO THAT.

Q So, when Seth tells us on the witness stand that Travis mentioned to him back in November that you were having conversations with him, you were having conversations with him, weren't you?

A Yes.

(Trial trans. 160:8-18)

The defense counsel made no objection to this line of questioning, to the argumentative phrasing, to the misquotes, or to the prosecutor's claim that Seth's testimony had identified Greene. The only exception taken was that the prosecutor was cutting-off Mr. Greene's answers. (Trial trans. 158:3-5)

In his closing arguments, the prosecutor said the following of Mr. Greene;

He's trying to adjust the story to accommodate the evidence. And that's all he's doing. Do you remember his demeanor on the witness stand? You're entitled to consider their appearance on the stand. Did he answer my questions directly or was he evasive? He told you on direct examination that he knew exactly what time Travis came to swim, 6:00 to 7:00 every night. And what he usually did with his clothes? He usually came in and threw his clothes in his locker.

Well, I asked Mr. Greene, "How come you know that?" "I don't understand the question." "Were you watching the boy?" "I don't understand the question." Of course he was. He was watching the boy for some time. He almost admits that. He couldn't quite bring himself to admit it but he almost did.

(Trial trans. 201:16-202.7)

There were still no objections from the Defense Counsel. After an hour and sixteen minutes the jury returned with a verdict of guilty.

Appellant's counsel repeatedly telephoned the Clerk of the Circuit Court of Prince William County concerning getting the record together for appeal to the Court of Appeals. For some undisclosed reason the Clerk of the Circuit Court of Prince William County filed the record with the Clerk of the Court of Appeals apparently without the transcripts. The Clerk did not order the transcripts from the transcriber until Dec. 28, 1998 which is well over the sixty (60) days from the date of the entry of the order (October 7, 1998). It is the long-standing practice of the Circuit Court in Prince William County to order the trial transcripts of each case for incorporation into the record. When the Clerk of the Circuit Court of Prince William County recognized her oversight she promptly ordered an "expedited" copy of the trial transcripts on December 28, 1998. We were informed that the Clerk's Office of the Circuit Court had failed to obtain a transcript. "It was on oversight on our part," we were told by the Deputy Clerk, Tamara L. Free. On January 13, 1999, the transcripts were transmitted to the Court of Appeals. *See Exhibit A – Affidavit of Transcriber.*

I. The rules are quite clear that the Clerk of the trial court has the responsibility to prepare the record and transmit same to the appropriate appellate court. Rule 5:13 "Record on appeal: Preparation and transmission".

a) Preparation – The Clerk of the trial court shall prepare the record as soon as possible after Notice of Appeal is filed. . . .

b) . . . . the failure of the Clerk of the trial court to transmit the record as herein provided shall not be a ground for dismissal of the appeal to this court."

See *Avery v. County School Board* 192 Va.329, 64 S.E.2nd. 767 (1951), in which the court stated that the record may be transmitted by any method the clerk selects. This is his responsibility. The court further stated that the clerk has performed his official duty.

This office contacted the Clerk of the Court many times to make sure of a timely transmitting of the complete record. Through oversight on the part of the Clerk of the Circuit Court, the entire record minus the transcripts were timely filed. When the Clerk realized the transcripts were missing and realizing that the Clerk had failed to order the transcripts, the Clerk directed the trial transcriber to file the transcripts in an "expedited" manner, which was already past the deadline date.

One must keep in mind that current Appellant's counsel was not the trial counsel and further Appellant's counsel is over 150 miles from Prince William Circuit Court and thus relied on the competence of the Clerk of the Circuit Court to put together the file including ordering the transcripts, which in addition to the requirement of the rules, has always been the custom of the courts, through out the Commonwealth of Virginia.

The Court of Appeals dismissed the appeal due to the untimely filing of the transcripts. The dismissal never addressed the merits of this case.

Since the responsibility to put the record together and transmit them to the appropriate Appellant Court is

by custom and rule the sole responsibility of the Clerk of the Circuit Court, upon a timely Notice of Appeal, the notice having been timely filed, the fault lies with the government agency and not the Appellant.

Therefore, to deny the appeal in this case is tantamount to a complete denial of Appellant's rights under both the 5th and 14th amendments of the U.S. Constitution and Article I, Section 8 of the Virginia Constitution and specifically the due process clause. Since the State has established an Appellate process, the State has a responsibility to provide the appropriate vehicle to process the appeal. The State, by not timely compiling and transmitting a complete record, failed in its responsibility all to the detriment of the Appellant, thus denying him due process.

II. The record was replete with relevant quotes from the record to enable the Court of Appeals to make an appropriate evaluation of the merits of the case. It was not necessary to even have the transcripts of the trial and sentencing in order for the court to proceed with the appeal.

In addition it is quite clear that the rules state: "the failure of the Clerk of the Circuit Court to transmit the record as herein provided shall not be a ground for dismissal of the appeal by this court."

In the *Avery* case, Supra, the court stated that it would be presumed that the Clerk has performed his official duty. This is so as to guarantee to the parties to an appeal that the appeal would not be dismissed due to errors by the Clerk. If this was anything else, then miscarriages of justice would be the rule and not the exception.

the Appellant and his attorney did not and do not have any control over the "goings on" of the Clerk of the Court, therefore, it would be ludicrous to hold the Appellant responsible for the acts of a non-agent.

If this case is not judged on its merits due to a procedural error on the part of the government, it would be very tempting, in the future, for the government to eliminate cases that they would wish not to deal with by performing "convenient errors". We all do hope that this would never occur but by denying this appeal it does open, for the future, a wide door of opportunity to do wrong.

III. IT WAS ERROR FOR THE COURT TO ALLOW THE TRIAL TO PROCEED WITHOUT FURTHER INQUIRY DESPITE DEFENDANT'S CLAIM THAT THE WITNESSES HE HAD REQUESTED WERE NOT PRESENT.

The judge undertook to discover if all the witnesses the Defendant had asked to be produced were present, and when told that none, in fact, were present he discontinued his inquiry and proceeded with the trial. While there might be no error in not asking the question at all, failing to follow up on a negative answer when given is to fall short of the trial judge's duty to see that the proceedings at trial are fairly conducted and serve the ends of justice. Mr. Greene had a solid reputation for honesty and certainly character witnesses would naturally be a cornerstone of his defense in this case, where credibility was the only real question of fact for the jury. (See Affidavit in support of motion to set aside jury verdict.) "In a trial by jury . . . the judge is not a mere

moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. United States*, 289 U.S. 466, 469, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). After taking it upon itself to determine if the witnesses the Defendant had requested were present, the trial court had a duty to pursue and reasonably resolve the matter to insure the integrity of the trial.

No formal exception regarding this matter was lodged at trial. However, the Defendant's own protestation that his witnesses were not present is tantamount objection by him under these circumstances. (Trial trans. 4:17-22) Being more outspoken would certainly risk putting himself at odds with his counsel just as his trial began. (Trial trans. 4:22-23) Moreover, the fact that the judge himself raised the matter obviates the usual need for his attention to be invoked through any formal objection and amounts to "good cause" for its omission. (Trial trans. Id.)

Even if the Court finds that a formal objection was required, it should still conclude that "ends of justice" exception of Rule 5A:18, should be applied. The "ends of justice" exception, Virginia's "plain error" rule, allows certain errors to be reviewed by this Court to redress substantial injustice even though such errors were unobjected to at trial. *Campbell v. Commonwealth*, 14 Va.App. 988, 421 S.E.2d 652 (1992); *Brown v. Commonwealth*, 8 Va.App. 126 (1989). The reason for requiring contemporaneous objection is "to avoid unnecessary appeals, reversals and mistrials by allowing the trial judge to intelligently consider an issue and, if necessary, to take corrective action." *Campbell v. Commonwealth*, 12 Va.App. 476, 480, 405 S.E.2d 1, 2 (1991) (*en banc*). The rule should

not be rigidly applied where its purpose is not served. *Campbell v. Commonwealth,* 14 Va. App. at 996-98, 421 S.E.2d at 657 (1992) (Barrow, J., concurring). In this instance the judge's immediate involvement in the matter clearly shows his full and intelligent awareness of the matter and invited further intervention on his part. The ability to present witnesses on one's behalf is doubtlessly one of the most fundamental rights a criminal defendant can have. In this instance, the Defendant went to trial without any testimony for his defense other than his own. In any case with no physical evidence and only a handful of witnesses, the prospect of additional testimony is likely to be critical to the outcome of the trial.

Under these exceptional circumstances it is appropriate for the Court to reach this question to serve the ends of justice and to remedy the miscarriage of justice suffered by a defendant who was brought to trial without the benefit of any of the witnesses he required for his defense.

IV. ERROR WAS PRESENT WHERE, (1) COMMONWEALTH'S ATTORNEY REPEATEDLY MISSTATED DEFENDANT'S TESTIMONY, VOUCHED FOR THE ACCURACY OF THOSE MISSTATEMENTS, CROSS-EXAMINED THE DEFENDANT WITH THESE BOLSTERED MISSTATEMENTS AND FOCUSED ON THEM IN HIS CLOSING ARGUMENT AS EVINCING BOTH DEFENDANT'S MOTIVE AND LACK OF CREDIBILITY; AND (2) HE FALSELY ATTRIBUTED TESTIMONY TO A PROSECUTION WITNESS DURING CROSS-EXAMINATION OF DEFENDANT.

The trial court erred in allowing improper questions and statements by the Commonwealth's Attorney and in

refusing to grant Defendant's post-trial motion to set aside the verdict on that issue.

A. THE STATEMENTS of the COMMONWEALTH'S ATTORNEY were IMPROPER and PREJUDICIAL.

A prosecutor is generally allowed a substantial degree of latitude both in cross-examination and in closing argument. 58 Am.Jur.2d *New Trial 187 (1989).* However, a prosecutor is prohibited from stating as facts matters not in evidence and otherwise misrepresenting evidence or testimony. *McCoy v. Commonwealth,* 125 Va. 771, 99 S.E. 644 (1919); *see, e.g., Wallace v. United States,* 281 F.2d 656, 668 (4th Cir. 1960); *United States v. Brainard,* 690 F.2d 1117, 1122-23 (4th Cir. 1982), *cert. den.* 471 U.S. 1099, 105 S.Ct. 2320 (1983); *Scott v. Commonwealth,* 18 Va.App. 692, 446 S.E.2d 619 (1994); *United States v. Guajardo-Melendez,* 401 F.2d 35, 40 (7th Cir. 1968). This includes misstating and misquoting the testimony of witnesses. *Id.*

"The effect of improper questions must be assessed in the context of the particular trial and will in most cases constitute reversible error." *Scott,* 18 Va.App. at 694-95, 446 S.E.2d at 620. Even a single improper question will warrant a reversal unless it is harmless. *Id.* at 695, 446 S.E.2d at 620. An improper question will not be harmless if it affects the credibility of a pivotal witness. *Id.*

In this case, the Commonwealth's Attorney repeatedly misquoted the Defendant, Mr. Greene, and cross-examined him with these misquotes of his own testimony.

The Prosecutor even went so far as to proclaim the misquote was accurate, stating that he had "wr[it]te[n] it down." (Trial trans. 157:16) This bolstering of the misquote is of critical significance. Stating that he "wrote it down" amounted to the Commonwealth's Attorney personally vouching for its accuracy. Adding this comment to an already argumentative question seemed successful in convincing the courtroom that the quote was genuine. This effect extended to the Defendant, who responded "yes" to the Prosecutor's argumentative query. (Trial trans. 157:19) The Defendant, of course, was under great pressure. He (presumably, like the jury) would not question the accuracy of the Commonwealth's Attorney's account of the testimony – not after he had taken the time to "write it down." The changes to his testimony were subtle (merely from "all he did was" to "usually he would just" [Trial trans. 152:7;157:18-7]) yet, the change would prove profoundly significant.

After Mr. Greene acquiesced to the Prosecutor's version of his testimony, it was used to impeach his claim that he had no intent to molest the boy. The prosecutor turned the misquote into an admission that Mr. Greene had been "watching" the boy for a long time. When Mr. Greene resisted this attempt he was effectively and wrongfully impeached in a ravaging cross-examination. The depth of this impeachment was not lost on the Prosecutor who capitalized on it during his closing argument:

> HE'S TRYING TO ADJUST THE STORY TO ACCOMMODATE THE EVIDENCE. AND THAT'S ALL HE'S DOING. DO YOU REMEMBER HIS DEMEANOR ON THE WITNESS STAND? YOU'RE ENTITLED TO CONSIDER THEIR APPEARANCE ON THE STAND. DID HE ANSWER MY QUESTIONS DIRECTLY OR

> WAS HE EVASIVE? HE TOLD YOU ON DIRECT EXAMINATION THAT HE KNEW EXACTLY WHAT TIME TRAVIS CAME TO SWIM, 6:00 TO 7:00 EVERY NIGHT. AND WHAT HE USUALLY DID WITH HIS CLOTHES? HE USUALLY CAME IN AND THREW HIS CLOTHES IN HIS LOCKER.
>
> WELL, I ASKED MR. GREENE, "HOW COME YOU KNOW THAT?" "I DON'T UNDERSTAND THE QUESTION." "WERE YOU WATCHING THE BOY?" I DON'T UNDERSTAND THE QUESTION." OF COURSE HE WAS. HE WAS WATCHING THE BOY FOR SOME TIME. HE ALMOST ADMITS THAT. HE COULDN'T QUITE BRING HIMSELF TO ADMIT IT BUT HE ALMOST DID.

(Trial trans. 201:16-202:7)

The Commonwealth's Attorney's revision of the Defendant's testimony, imbued an otherwise innocuous statement with crucial meaning that ran right to the heart of the case. In his closing, the Prosecutor argues – convincingly – that these misquotes demonstrate Mr. Greene was stalking the boy with intent to molest. Moreover, when the Defendant avoided acquiescing to this new meaning the Commonwealth's Attorney made him out as a liar. Yet, in reality, this admission was not the Defendant's testimony at trial, but, in effect, the unsworn testimony of the Commonwealth's Attorney. *Cf., McCoy, supra; Wallace, supra; Brainard, supra.*

The prosecutor's wrongful impeachment of the Defendant went so afar in undermining his credibility that a reversal would certainly be required under the rule of *Scott v. Commonwealth*, 18 Va.App. 692, 446 S.E.21d 619 (1994) ("The effect of improper questions must be assessed in the context of the particular trial and will in most cases constitute reversible error." *Id.* at 694-95, 446

S.E.2d at 620.) The *Scott* court focused on the fact that this single, improper question by the prosecutor had tended to impeach the defense's only exculpatory witness. Because the credibility of this witness was a pivotal issue at trial, wrongful impeachment – even by a single question – deprived the Defendant of a fair trial. Mr. Greene's situation is similar: He was cross-examined and then impeached with unsupported (and, in this case, inaccurately quoted) evidence. He was also the sole exculpatory witness on his behalf – the only person who could testify directly to his innocence. Therefore, his credibility was at the core of his defense. *Cf., id.* at 694-95, 446 S.E.2d at 620. To the *Scott* court, this fact alone meant that there was prejudicial error: "Th[e] suggestion, offered by the Commonwealth's attorney, may have affected the jury's willingness to believe the defense witness. Therefore, we cannot say, "without usurping the jury's fact finding function, that had the error not occurred, the verdict would have been the same." *Id.* at 695, 446 S.E.2d at 620; quoting the *Lavinder v. Commonwealth*, 12 Va.App. 1003, 1005, 407 S.E.2d 910, 911 (1991) (*en banc*).

The Prosecutor also misrepresented the testimony of Seth Hurley, who had specifically stated that he was not told who the man was that had spoken to Travis. (Trial trans. 103:16-22) Again, misrepresenting a small shift in meaning, couched argumentatively, yields an apparently significant admission from the Defendant.

Be the products of neglect or artifice, these highly prejudicial actions of the Commonwealth's Attorney demanded the intervention to the trial court either at the time or in response to the post-trial motion. In either case, this Court should grant the Defendant a new trial, one

comporting with the standards of fairness demanded by the courts of this Commonwealth.

B. THE "ENDS OF JUSTICE EXCEPTION" SHOULD BE APPLIED.

In the absence of timely objection most trial errors will not be entertained on subsequent appeal. Rule 5A:18. The "ends of justice" exception, Virginia's "plain error" rule, allows certain errors to be reviewed by this Court to redress substantial injustice, even though such errors remained unobjected to at trial. *Campbell v. Commonwealth*, 14 Va.App. 988, 421 S.E.2d 652 (1992); *Brown v. Commonwealth*, 8 Va.App. 126 (1989). According to *Campbell*, issues should be noticed under the "ends of justice" exception if the error involved is "clear, substantial and material." This test is basically similar to the plain error test applied in West Virginia and in federal courts. *Cf. State v. Myers*, No. 25004, slip op. (November 20, 1998); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1170, 123 L.Ed.2d 508 (1993); *see generally, Pharo v. State: Plain Error by Any Other Name?* Christina Dawn Ferguson, Note 44 Ark.L. Rev. 779 (1991).

There can be little doubt that the error that the statements of the Commonwealth's Attorney were very clearly improper, substantial in that they threatened fundamental aspects of the proceedings and material in that they were likely to impact the outcome of the trial. See, *Campbell*, 14 Va.App. at 997-98, 421 S.E.2d at 657-58 (Barrow, J., concurring). Moreover, courts have found plain error in similar cases. *Morgan v. Commonwealth*, No. 0477-91-1 (Va. Ct. App. March 31, 1992), the Commonwealth's Attorney

described the conviction of Morgan's co-defendant in his opening statement. Despite the fact that defense counsel had failed to raise the matter at trial court in a timely fashion, this Court held that the Prosecutor's comment had undermined the integrity of the trial and remand the case for new proceedings. *Morgan*, No. 0477-91-1, slip op. at *1; *cf. People v. Migliori*, 273 A.D. 915, 77 N.Y.S.2d 707 (1948).

In *United States v. Brainard*, 690 F.2d 1117, 1122-23 (4th Cir. 1982), a court addressed the misquoting of a defendant specifically:

> Defense counsel failed to object to the prosecution's remarks. Nevertheless, an appellate court can in exceptional circumstances notice intemperate remarks if they were devious, or if they otherwise seriously affected the fairness, integrity or public reputation of the judicial proceedings. It is difficult to imagine comments which would more seriously affect the fairness of a trial than repeated misquotations of the defendants with respect to the only disputed issue. The remarks constitute plain error. [*Brainard*, 690 F.2d at 1122-23 (citations omitted.).]

Furthermore, a panel of the Fourth Circuit found, it cannot be assumed that substantial misquotes will have anything less than prejudicial consequences:

> We cannot agree with the Government that the prejudicial effect of such misquoting was removed by the United States Attorney and the trial judge telling the jurors that it was for them to recall the actual statement. These repeated and seemingly deliberate misquotes, which we believe could have created a[] [false] impression

> on the jury . . . may well have become so firmly implanted on the jurors' minds as to cloud the actual testimony. We are of the opinion that the [actual] testimony [] does not necessarily support the inference attributed to it by the United States Attorney in his distorted version thereof. [*Wallace v. United States*, 281 F.2d at 667-68 (citations omitted).]

Considering the potential prejudicial impact of misquoted testimony on the jury the court used the plain error rule to reach the ends of justice and reversed the conviction, despite the absence of timely defense objections. *Id.*

Our Defendant's first trial ended with a deadlock jury. This case is clearly a close one. Necessarily, the jury's judgment boiled down to whether they believed Mr. Greene's account, or that of two boys. In the first trial, some jurors believed the boys and some believed Mr. Greene. Without these errors the second jury could have come in with an acquittal or perhaps another deadlock, as in the first trial. As in *Morgan*, the prejudice is apparent in the verdict. *Morgan*, No. 0477-91-1, slip op. at *1. Moreover, as in *Wallace*, the impact of the Commonwealth's Attorney's is so deeply entangled with the jury's verdict that the latter cannot be isolated from it. Finally, as in *Scott*, when a trial's landscape is upset by the wrongful impeachment of a pivotal witness, it will be the province of a new jury to decide the Defendant's guilt or innocence, upon untainted evidence.

A miscarriage of justice such as this must not go unaddressed if we are to ensure the integrity and fairness

of our courtrooms. Plain error is manifest here and warrants application of the ends of justice exception by this Honorable Court.

CONCLUSION

For the foregoing reasons, the errors at the trial court warrant setting aside the judgment below. This cannot happen unless the Supreme Court permits this appeal.

The Appellant prays that this Honorable Court allow Appellant the appeal so as to permit a full Appellate hearing on the merits and thus foster the Ends of Justice.

CERTIFICATE

Pursuant to Rule 5:17 5e Appellant states as follows:

1. The name, address and telephone number of appellant is George David Greene, 8212 McBeth Street, Manassas, Virginia 20110, 703-368-9632;

2. The name, address and telephone number of counsel for appellant is Francis Chester, 3581 Churchville Avenue, Churchville, Virginia 24421, 540-337-7270;

3. The name, address and telephone number of counsel for appellee is James Willett, Asst. Commonwealth Attorney, 9311 Lee Avenue, Manassas, Virginia 703-792-6050;

4. A copy of the foregoing Petition for Appeal has been mailed to James Willett, Asst. Commonwealth's Attorney this 6th Day of July, 1999;

5. Counsel for Defendant has been privately retained;

6. Attorney for Appellant, Francis Chester, wishes to argue orally, in person, to a panel of this court the reasons why this Petition For Appeal should be granted.

Respectfully submitted,

By /s/ Francis Chester
Francis Chester, Esq.
Attorney for Appellant

Dated: July 6, 1999